

Fairfax County
Procedures Regarding Requests Made Pursuant to
the Public-Private Education Facilities and
Infrastructure Act of 2002



Adopted by the Fairfax County Board of Supervisors on February 24, 2003

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I. INTRODUCTION

The Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code Ann. §§ 56-575.1 to -575.16 (LNMB Supp. 2002) (the “PPEA”), grants a public entity the authority to create public-private partnerships for the development of a wide range of projects for public use (“qualifying projects”) if the public entity determines that there is a need for a project and that private involvement may provide the project to the public in a timely or cost-effective fashion. The definition of “public entity” in § 56-575.1 of the PPEA includes, *inter alia*, any political subdivision of the Commonwealth.

Section 56-575.16 of the PPEA provides that a public entity having the power to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate a qualifying project (a “responsible public entity”) may not consider any proposal by a private entity for approval of the qualifying project pursuant to the PPEA until the responsible public entity has adopted and made publicly available procedures that are sufficient to enable the responsible public entity to comply with the PPEA. Accordingly, these procedures (the “Procedures”) are hereby adopted by the Board of Supervisors (the “Board”) as the governing body of the County of Fairfax (the “County”).

II. GENERAL PROVISIONS

A. Proposals

1. Pursuant to Section 56-575.4 of the PPEA, a proposal to provide a qualifying project to a responsible public entity may be either solicited from private entities by the public entity (a “Solicited Bid/Proposal”) or delivered to the public entity by a private entity on an unsolicited basis (an “Unsolicited Proposal”). In either case, any such proposal shall be clearly identified as a “PPEA Proposal.”

2. The requirements for any particular Solicited Bid/Proposal shall be as specified in the solicitation by the County for that particular proposal and shall be consistent with all applicable provisions of the PPEA.

3. Any Unsolicited Proposal shall be submitted to the County by delivering six complete copies, together with the required initial review fee as provided below in § IV(C), to the Director, Department of Purchasing and Supply Management, 12000 Government Center Parkway, Suite 427, Fairfax, Virginia 22035-0013. Other requirements for an Unsolicited Proposal are as set forth below in § IV. A working group may be designated by the County Executive to review and evaluate all unsolicited proposals.

4. The County may require that any proposal be clarified. Such clarification may include but is not limited to submission of additional documentation, responses to specific questions, and interviews with potential project participants.

B. Affected Local Jurisdictions

1. The term “affected local jurisdiction” includes any county, city or town in which all or a portion of a qualifying project is located.

2. Any private entity submitting a Solicited Bid/Proposal or an Unsolicited Proposal to the County as the responsible public entity for a qualifying project must provide any other affected local jurisdiction with a copy of the proposal by certified mail, express delivery, or hand delivery within five (5) business days of submission of the proposal to the County. Any such other affected local jurisdiction shall have 60 days from the date it receives its copy of the proposal to submit written comments to the County and to indicate whether the proposed qualifying project is compatible with the affected local jurisdiction’s local comprehensive plan, local infrastructure development plans, capital improvements budget, or other government spending plan. The County will consider comments received within the 60-day period prior to entering into a comprehensive agreement pursuant to the PPEA regarding the proposal. However, the County may begin or continue its evaluation of any such proposal during the 60-day period for the receipt of comments from affected local jurisdictions.

C. Virginia Freedom of Information Act

1. Any confidential and proprietary information provided to a responsible public entity by a private entity pursuant to the PPEA shall be subject to disclosure under the Virginia Freedom of Information Act (“FOIA”) except as provided by § 56-575.4(G) of the PPEA.

2. In order to prevent the release of any confidential and proprietary information that otherwise could be held in confidence pursuant to § 56-575.4(G) of the PPEA, the private entity submitting the information must (i) invoke the exclusion from FOIA when the data or materials are submitted to the County or before such submission, (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. A private entity may request and receive a determination from the County as to the anticipated scope of protection prior to submitting the proposal. The County is authorized and obligated to protect only confidential proprietary information, and thus will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the private entity without reasonably differentiating between the proprietary and non-proprietary information contained therein.

3. Upon receipt of a request from a private entity that designated portions of a proposal be protected from disclosure as confidential and proprietary, the County will determine whether such protection is appropriate under applicable law and, if appropriate, the scope of such appropriate protection, and shall communicate its determination to the private entity. If the determination regarding protection or the scope

thereof differs from the private entity's request, then the County will accord the private entity a reasonably opportunity to clarify and justify its request. Upon a final determination by the County to accord less protection than requested by the private entity, the private entity will be given an opportunity to withdraw its proposal. A proposal so withdrawn will be treated in the same manner as a proposal not accepted for publication and conceptual-phase consideration as provided below in § IV(A)(1).

D. Use of Public Funds

Virginia constitutional and statutory requirements as they apply to appropriation and expenditure of public funds apply to any comprehensive agreement entered into under the PPEA. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds shall be incorporated into planning for any PPEA project or projects.

E. Applicability of Other Laws

Nothing in the PPEA shall affect the duty of the County to comply with all other applicable law not in conflict with the PPEA. The applicability of the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA.

III. SOLICITED BID/PROPOSALS

The procedures applicable to any particular Solicited Bid/Proposal shall be specified in the solicitation for that proposal and shall be consistent with the requirements of the PPEA and any other applicable law. All such solicitations shall be by issuance of a written Invitation to Bid ("IFB") or Request for Proposal ("RFP") within the meaning of those terms as used in the Fairfax County Purchasing Resolution. Any proposal submitted pursuant to the PPEA that is not received in response to an IFB or RFP shall be an Unsolicited Proposal under these procedures, including but not limited to (a) proposals received in response to a notice of the prior receipt of another Unsolicited Proposal as required by the PPEA and provided for below in § IV(A)(2) and (b) proposals received in response to publicity by the County concerning particular needs when the County has not issued a corresponding IFB or RFP, even if the County otherwise has encouraged the submission of proposals pursuant to the PPEA that address those needs.

IV. UNSOLICITED PROPOSALS

The process for evaluating an Unsolicited Proposal, which is described in detail below, consists of four steps. Briefly summarized, upon receipt of an Unsolicited Proposal the County's first step will be to determine whether to accept it for consideration at the conceptual stage. If so, then in step two the County will give public notice of the Unsolicited Proposal. In step three the County will proceed with a review at

the conceptual stage of the original Unsolicited Proposal and/or any proposal received in response to the public notice and accepted for consideration at the conceptual stage. Step four is an in-depth review at the detailed stage of the original Unsolicited Proposal and/or any proposal received in response to the public notice and accepted for consideration at the detailed stage. However, the County may discontinue its evaluation of any proposal at any time. Furthermore, if the County determines that it is in the County's interest to do so with respect to any Unsolicited Proposal, the County may eliminate review at the conceptual stage and proceed directly to a review at the detailed stage.

A. Decision to Accept and Consider Unsolicited Proposal; Notice

1. Upon receipt from a private entity of any Unsolicited Proposal accompanied by payment of any required fees, the County will determine whether to accept the Unsolicited Proposal for publication and conceptual-phase consideration, as described below. If the County determines not to accept the proposal at this stage it will return the proposal and the accompanying initial review fee to the private entity.

2. If the County chooses to accept an Unsolicited Proposal for conceptual-phase consideration, it shall give public notice of the proposal in accordance with the PPEA and shall specify a period of time not less than 45 days during which it will receive competing Unsolicited Proposals pursuant to § 56-575.4(A) of the PPEA. Although not required by the PPEA, at the discretion of the County such notice may be given consistent with the requirements for public notice as set forth in the Fairfax County Purchasing Resolution. During the 45-day period for receiving competing Unsolicited Proposals, the County may continue to evaluate the original Unsolicited Proposal.

B. Contents of Initial Submission

1. An Unsolicited Proposal must contain information on the private entity's qualifications and experience, project characteristics, project financing, anticipated public reaction, and project benefit and compatibility. The information should be adequate to enable the County to evaluate the practicality and sufficiency of the proposal. The private entity may request that the County consider a two-step proposal process, consisting of an initial conceptual submission to be followed by a more detailed submission.

2. Unsolicited Proposals should provide a concise description of the private entity's capability to complete the proposed qualifying project and the benefits to be derived from the project by the County. Project benefits to be considered may occur during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a comprehensive scope of work and a financial plan for the project, containing enough detail to allow an analysis by the County of the financial feasibility of the proposed project, including but not limited to (a) the identity of any parties expected to provide financing for the project and (b) a statement

indicating whether the private entity intends to request the County to provide resources for financing the project and the nature and extent of any such resources.

3. The County may require additional submissions to clarify information previously provided or to address other areas of concern to the County.

C. Review Fees

1. A review fee will be charged a private entity submitting an Unsolicited Proposal to the County, to cover the County's costs of processing, reviewing, and evaluating the proposal, including the cost to compare it to any competing proposals. Such costs include but are not limited to County staff time, the cost of any materials or supplies expended, and the cost of any outside advisors or consultants, including but not limited to attorneys, consultants, and financial advisors, used by the County in its sole discretion to assist in processing, reviewing, or evaluating the proposal. Such fees generally shall be in the amount necessary to completely cover all of the County's costs.

2. Such fees shall be imposed based on the reasonably anticipated costs to the County in accordance with the following schedule:

a. Initial fee. Payment of an initial fee must accompany the submission of the Unsolicited Proposal to the County in order for the County to proceed with its review. The initial fee shall be two and one-half percent (2.5%) of the reasonably anticipated total cost of the proposed qualifying project, but shall be no less than \$2,500 nor more than \$50,000, regardless of the anticipated total cost.

b. Additional fees. Additional fees shall be imposed on and paid by the private entity throughout the processing, review, and evaluation of the Unsolicited Proposal if and as the County reasonably anticipates incurring costs in excess of the initial fee paid by the private entity. The County will notify the private entity of the amount of such additional fees as and when it anticipates incurring such costs. Prompt payment of such additional fees is required before the County will continue to process, review, and evaluate the proposal.

c. Reimbursement of excess fees paid. In the event the total fees paid by the private entity exceed the County's total costs incurred in processing, reviewing, and evaluating the proposal, the County shall reimburse the difference. Otherwise, the County shall retain all fees paid.

D. Initial Review at the Conceptual Stage

1. Only proposals complying with the requirements of the PPEA and these Procedures that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format, as described below, will be considered by the County for further review at the conceptual stage.

2. The County will determine at this initial stage of review whether it will proceed using procurement through competitive sealed bidding as defined in the VPPA or procedures developed by the County that are consistent with procurement of other than professional services through competitive negotiation as defined in the VPPA.

3. After reviewing an Unsolicited Proposal and any competing Unsolicited Proposals submitted during the notice period, the County may determine (a) not to proceed further with any proposal, (b) to proceed to the detailed phase of review with the original proposal, (c) to proceed to the detailed phase with a competing proposal, or (d) to proceed to the detailed phase with multiple proposals. The County at all times retains the right to reject any proposal at any time for any reason whatsoever.

E. Format for Submissions at the Conceptual Stage

Unsolicited Proposals at the conceptual stage shall contain the following information in the following format, plus such additional information as the County may request:

1. Qualification and Experience

a. Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the project, the management approach and how each partner and major subcontractor in the structure fits into the overall team.

b. Describe the experience of the firm or consortium of firms making the proposal and the key principals involved in the proposed project including experience with projects of comparable size and complexity. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties. Provide resumes of the key individuals who will be involved in the project.

c. Provide the names, addresses, and telephone numbers of persons within the firm or consortium of firms who may be contacted for further information.

d. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of twenty percent or greater.

e. Identify any persons known to the private entity who would be obligated to disqualify themselves from participation in any transaction arising from or

in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.

2. Project Characteristics

- a. Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.
- b. Identify and fully describe any work to be performed by the County or any other public entity.
- c. Include a list of all federal, state and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.
- d. Identify any anticipated adverse social, economic and environmental impacts of the project. Specify the strategies or actions to mitigate known impacts of the project.
- e. Identify the projected positive social, economic and environmental impacts of the project.
- f. Identify the proposed schedule for the work on the project, including the estimated time for completion.
- g. Propose allocation of risk and liability for work completed beyond the agreement's completion date, and assurances for timely completion of the project.
- h. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the public entity's use of the project.
- i. Provide information relative to phased or partial openings of the proposed project prior to completion of the entire work.
- j. Describe any architectural, building, engineering, or other applicable standards that the proposed project will meet.

3. Project Financing

- a. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.

b. Submit a plan for the development, financing and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds.

c. Include a list and discussion of assumptions underlying all major elements of the plan.

d. Identify all anticipated risk factors and methods for dealing with these factors.

e. Identify any local, state or federal resources that the private entity contemplates requesting for the project. Describe the total commitment, if any, expected from governmental sources (and identify each such source) and the timing of any anticipated commitment.

f. Identify any third parties that the private entity contemplates will provide financing for the project and describe the nature and timing of each such commitment.

4. Project Benefit and Compatibility

a. Describe the anticipated benefits to the community, region or state, including anticipated benefits to the economic condition of the County, and identify who will benefit from the project and how they will benefit.

b. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition, for the project.

c. Explain the strategy and plans that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.

d. Explain whether and, if so, how the project is critical to attracting or maintaining competitive industries and businesses to the County or the surrounding region.

e. Explain whether and, if so, how the project is compatible with the County's comprehensive plan, infrastructure development plans, capital improvements budget, or other government spending plan.

F. Format for Submissions at the Detailed Stage

If the County decides to proceed to the detailed phase of review with one or more Unsolicited Proposals, then the following information must be provided by the private entity unless waived by the County:

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.
2. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the private entity to accommodate such crossings.
3. A statement and strategy setting out the plans for securing all necessary property. The statement must include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the private entity intends to request the public entity to condemn.
4. A detailed listing of all firms that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties.
5. A total life-cycle cost specifying methodology and assumptions of the project or projects and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses.
6. A detailed discussion of assumptions about user fees or rates, and usage of the projects.
7. Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.
8. Demonstration of consistency with appropriate local comprehensive or infrastructure development plans or indication of the steps required for acceptance into such plans.
9. Explanation of how the proposed project would impact local development plans of each affected local jurisdiction.
10. Identification of any known conflicts of interest or other limitations that may impact the County's consideration of the proposal, including the identification of any persons known to the private entity who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.

11. Detailed analysis of the financial feasibility of the proposed project, including its impact on similar facilities operated or planned by the County. Include a detailed description of any financing plan proposed for the project, a comparison of that plan with financing alternatives that may be available to the County, and all underlying data supporting any conclusions reached in the analysis or the selection by the private entity of the financing plan proposed for the project.

12. Additional material and information as the County may request.

V. PROPOSAL EVALUATION AND SELECTION CRITERIA

Some or all of the following matters may be considered in the evaluation and selection of PPEA proposals. However, the County retains the right at all times to reject any proposal at any time for any reason whatsoever.

A. Qualifications and Experience

Factors to be considered in either phase of the County's review to determine whether the private entity possesses the requisite qualifications and experience may include but are not necessarily limited to:

1. Experience with similar projects;
2. Demonstration of ability to perform work;
3. Leadership structure;
4. Project manager's experience;
5. Management approach;
6. Financial condition; and
7. Project ownership.

B. Project Characteristics

Factors to be considered in determining the project characteristics may include but are not necessarily limited to:

1. Project definition;
2. Proposed project schedule;

3. Operation of the project;
4. Technology; technical feasibility;
5. Conformity to laws, regulations, and standards;
6. Environmental impacts;
7. Condemnation impacts;
8. State and local permits; and
9. Maintenance of the project.

C. Project Financing

Factors to be considered in determining whether the proposed project financing allows adequate access to the necessary capital to finance the project may include but are not necessarily limited to:

1. Cost and cost benefit to the County;
2. Financing and the impact on the debt or debt burden of the County;
3. Financial plan;
4. Estimated cost;
5. Life-cycle cost analysis; and
6. The identity of any third party that will provide financing for the project and the nature and timing of their commitment.

D. Project Benefit and Compatibility

Factors to be considered in determining the proposed project's compatibility with the appropriate local or regional comprehensive or development plans may include but are not necessarily limited to:

1. Community benefits;
2. Community support or opposition, or both;
3. Public involvement strategy;

4. Compatibility with existing and planned facilities; and
5. Compatibility with local, regional, and state economic development efforts.

VI. COMPREHENSIVE AGREEMENT

Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating any qualifying project, a selected private entity shall enter into a comprehensive agreement with the County as provided by the PPEA. Any such comprehensive agreement, and any amendment thereto, must be approved by the County's Board of Supervisors before it is entered into on behalf of the County.

As provided by the PPEA, the terms of the comprehensive agreement shall include but not be limited to:

1. Delivery of maintenance, performance and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project, in the forms and amounts satisfactory to the County;
2. Review and approval of plans and specifications for the qualifying project by the County;
3. The right of the County to inspect the qualifying project;
4. Maintenance of a policy or policies of liability insurance or self-insurance in from and amount satisfactory to the county and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project;
5. Monitoring of the practices of the operator by the County to ensure proper maintenance;
6. Reimbursement to be paid to the County for services provided by the County;
7. Filing by the operator of appropriate financial statements on a periodic basis;
8. Policies and procedures governing the rights and responsibilities of the County and the operator in the event that the comprehensive agreement is terminated or there is a material default by the operator, including the conditions governing

assumption of the duties and responsibilities of the operator by the County and the transfer or purchase of property or other interests of the operator by the County;

9. Providing for such user fees, lease payments, or service payments, if any, as may be established from time to time by agreement of the parties, which shall be the same for persons using the facilities under like conditions and shall not materially discourage use of the qualifying project. Classifications according to reasonable categories for assessment of user fees may be made.

10. Requiring a copy of any service contract to be filed with the County and providing that a schedule of the current user fees or lease payments shall be made available by the operator to any member of the public upon request.

11. The terms and conditions under which the responsible public entity may contribute financial resources, if any, for the qualifying project; and

12. Any other provisions required by applicable law.

Any changes in the terms of the comprehensive agreement as may be agreed upon by the parties from time to time shall be added to the comprehensive agreement only by written amendment.